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ABSTRACT

During the last two years, New York State has made considerable progress toward opening its government to public inspection. This report discusses New York's open-records law and the creation of the Committee on Public Access to Records, a group of individuals who "interpret the law, oversee its implementation, establish procedures, and propose revisions." Research into the laws of other states reveals that the New York committee is the only one of its kind in the nation. The history of access in New York, the formation and actions of the Committee on Public Access, cases under the new law, criticism of the Freedom of Information Law, and proposed revision of the Freedom of Information and Open Meetings laws are discussed. An appendix provides the text of article six of the Freedom of Information Law. (KS)

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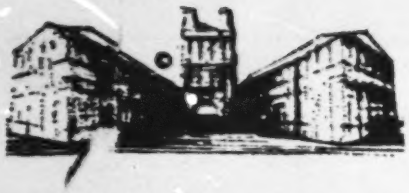

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FREEDOM OF INFORMATION CENTER REPORT NO. 340

NEW YORK'S ACCESS TO RECORDS LAW

This report was written by ROBERT J. TIERNAN, an M.A. candidate in the School of Journalism.

Introduction

National distaste for conduct of the government over the last decade has fueled a movement toward greater openness in the public affairs of the country. Revelations of government corruption, illegal spying and unauthorized foreign wars aided passage in 1974 of the amendments to the federal Freedom of Information Act. This trend reached (N.Y. *Times*, 5-11-74) state government, too, and in New York, aided passage of a Freedom of Information Law modeled after the federal statute.

Thus, New York has a comprehensive access-to-records law for the first time. Previous statutes were fraught with ambiguity and did not apply to records of local governmental bodies and agencies. The New York law gives access to certain records at both the state and local levels. Although criticized as flawed in many ways, the law represents a beginning for greater accountability in government. It also contains an innovative provision establishing a committee to interpret the law, oversee its implementation, establish procedures and propose revisions.

Freedom of information in the state has a background of being frustrated by powerful governmental interests. Through the 1960s, several bills to open agency books were proposed and subsequently killed in the legislature.

The statute contains many ambiguities and has no provision for general disclosure. Instead, it lists records which are to be made available. There are proposals to amend it to continue the trend in the state toward open government.

Summary of the Law

The New York law, while patterned after the federal Freedom of Information Act, contains a number of novel provisions. Chief among these is the establishment of a Committee on Public Access to Records. Unlike the federal law and other state codes that define procedures for availability of documents, the New York FoI law gives the committee substantial statutory authority to issue regulations for use of records and implementation of the statute.[1]

The committee comprises seven members: three government officers and four gubernatorial appointees, of which two must be members of the media. Except for the charter members who serve staggered tenures, all appointees will serve four-year terms.

Three main concerns of the committee are specified: advising agencies and municipalities through guidelines, opinions and regulations on the act; recommending further changes in the law; and issuing rules and guidelines for agencies to follow in making information available. In regard to this last provision, the act lists a number of specific matters that the committee must issue guidelines for. These include the times and places records are available; persons responsible for divulging records; fees for copying; and procedures for requesting documents. The statute also requires the committee to issue rules for the maintenance of a list of any records filed, including identifying information, after Sept. 1, 1974.[2]

While open records laws in many other states also contain sections safeguarding individual privacy, the New York law gives the Committee on Public Access the authority to make rules to this end. A number of critics contend this is equivalent to putting a wolf in charge of guarding the chicken coop, since the committee is charged to expedite disclosure of information.

The section of the law safeguarding privacy of individuals is so extensive that the statute was described (*New York Law Journal*, 2-18-74) by Jerome Wilson, a former state senator and a political reporter, as a "right to know/right to privacy statute." The law gives the committee authority to issue guidelines for deletion of identifying details in the records requested for disclosure.[3] This section defines an invasion of privacy as including, but not limited to:

a) Disclosure of such personal matters as may have been reported in confidence to the agency or municipality and which are not relevant to the ordinary work of the agency or municipality;

b) Disclosure of employment, medical or credit histories or personal references of applicants for employment, except when such records may be disclosed when the applicant has provided a written release permitting such disclosure;

Summary: New York's open records law is unique in its provision of a Committee on Public Access, a group of individuals who "interpret the law, oversee its implementation, establish procedures, and propose revisions."

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c) Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

d) The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes;

e) Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality.[4]

In the absence of any guidelines issued by the committee for deletion of materials of a private nature from records, the agency must use its own discretion.

This section detailing privacy protection is in addition to a list of three other exemptions from disclosure under the law. The code says the disclosure provisions of the law do not apply to information exempted from disclosure by statute or material confidentially disclosed to an agency for the regulation of business, which would result in an unfair advantage for competitors. This provision does not apply to records required to be disclosed by other statutes. The final exemption concerns part of investigatory files compiled for law enforcement purposes.[5]

New York is like many other states with FoI laws, in that instead of granting a broad authority for disclosure of records, as in the federal act, its code contains a list of records that are to be available to the public. Included are: final opinions, concurring and dissenting opinions in litigation; policy statements and supporting factual data; minutes of meetings and hearings; audits and supporting data; staff instructions and manuals; name, address, title and salary of government employees, excepting law enforcement officers; final determinations and dissenting opinions of governing bodies; police blotters and booking records and any other documents required to be open by law.[6]

Although the law does not make a sweeping provision, as does the federal law that all records be open for public use, with certain exceptions,[7] the bill's sponsor maintains that "the list is not intended to be exhaustive, but merely to indicate the nature of the documents that are to be made available."[8]

The closest the FoI law comes to enunciating a general policy of disclosure exists in the legislative intent preamble. This section declares the necessity of a responsive government in a free society, and states that access to information should not be hindered with secrecy. The preamble concludes with the sentiment that the public, through the news media, should have unimpaired access to government records.

History of Access in New York

Until passage of the FoI law, state rules governing access generally carried provisions requiring that the applicant for records have status as a taxpayer or citizen and show some need or purpose for examination of the records.

In an early English case, cited in a special committee memorandum on the history of information regulations, this right to know was tempered by a requirement of need to know.[9] In *King v. Justices of Staffordshire*, the court established the right of taxpayers to inspect every document of a public nature, provided the citizen showed himself interested. The state legislature incorporated part of this requirement into legislation drafted in the late 1800's concerning public access to records. An additional stricture was added, however, stating that taxpayer could inspect records, but "only in connection with a lawsuit to prevent waste by government officials."[10]

Section 51 of the General Municipal Law was passed in 1909, to govern access to local records; it still required that a taxpayer request the records for a suit against an official. The problem with this statute is that it fails to define what records were to be made available. Since there was no adequate definition of just what a "paper" was, in the law's language, courts had to define it on a case by case basis. A revision in 1973 extended the right of access to registered voters.[11]

A court ruled in *Matter of Egan*,[12] "At Common Law, the right of inspection was given to every citizen and taxpayer, and it may be abridged only by explicit statutory enactment." This decision extended the right of access to records beyond lawsuits against public officials.

On the state level, Section 66 of the Public Officers Law commanded that copies of records be made available on request by any person. This law eliminated the requirement of status as a taxpayer or resident or registered voter for obtaining documents.[13] The problem with this section was its lack of definition concerning what records were to be made available. This law merely provided a procedure for inspection of records once they were determined to contain public information.

The ambiguity in state laws prior to adoption of the FoI law surfaced in the continuing series of confrontations over availability of records. There was no one area in which freedom of information was continually thwarted. Rather, it was individual instances of denial to welfare records, police records of juveniles, public authorities and agencies, court instructions to juries and other documents. Piecemeal arrangement of laws resulted, providing access to certain records, and continuing controversy in other areas.

In 1959, the New York State Publishers Association began to lobby for freer disclosure of records of all kinds. The association proposed (*Editor & Publisher*, 9-19-59) that the legislature pass a law requiring county officials to publish full lists of tax-exempt property. They also sought changes in the criminal code to make public records of the arrest of any person age 16 or older; an amendment to the Children's Court Act to allow information about crimes of persons under 16 years of age to become public, except for the names; and revisions in welfare laws to allow public examination of all municipal and state welfare departments.

In 1960, Governor Nelson A. Rockefeller signed (*Editor & Publisher*, 5-7-60) a bill that clarified the right of newsmen to inspect public welfare records. The law revised a 1953 statute that governed access to the records. The earlier statute had embodied (Washington *Post*, 6-2-59) the concept of open records, but local officials had been interpreting the law to deny access to records.

The New York *Post* sued the Triborough Bridge and Tunnel Authority in 1960 for disclosure of agency records on contracts, property purchases and outside employment of executives. The authority's refusal was upheld by an appeals court after a two-year court battle.[14]

The newspaper argued that although no specific statute existed requiring public disclosure of the informa-

tion by the authority, Section 66 of the Public Officers law stated that the authority was a public office or agent of the city. The court disagreed, ruling that the authority did not fit that classification, and was not subject to the Public Officers Law.

The decision overturned previously favorable court rulings that citizens had the right to inspect records and that the right could be abridged only by law.[15] This case made it clear that the right of access to state records was often ambiguous and in many instances nonexistent. Realizing the difficulty in relying on the Public Officers Law, Section 66, for unimpaired right to information, legislation was introduced (New York *Times*, 2-19-62) into the state senate to open the records of all public authorities, but the bill died without attaining passage in the Assembly. A similar bill was reintroduced in 1966 in the Senate,[16] but it never became law.

The next major effort to provide a clear legal basis for freedom of information for all governmental bodies in the state came at the State's Constitutional Convention in 1967. The Convention voted (New York *Times*, 9-21-67) to open the books of all public authorities to public scrutiny, but left it to the legislature to determine the specifics of the requirement. The provision was criticized (*Publishers' Weekly*, 10-9-67) because only the State Controller's office was to have the power to examine the records, and therefore, records would not have been directly available to the public. In the end, that did not matter since voters rejected (New York *Times*, 11-8-67) the proposed charter by a 3-1 margin, largely because of controversy surrounding other sections.

Legislation introduced to open the files of all government agencies went down (New York *Times*, 9-21-67) to defeat during the 1967 legislative session, largely because of tremendous opposition from Robert Moses, chairman of the Triborough Bridge and Tunnel Authority. Moses had been instrumental in killing such freedom of information bills in past years. Similar legislation was sponsored (*Editor & Publisher*, 12-9-67) in the 1968 session, and again in 1970, but did not become law.

The FoI law that became effective in September, 1974, was the product of several years of work by the Assembly Committee on Governmental Operations and the Subcommittee on the Right of Privacy of the Senate Judiciary Committee. The Assembly passed the bill first in 1973, but it did not then pass the Senate.[17]

Reintroduced in the 1974 session, the legislation gained (New York *Times*, 5-2-74) tentative approval in the Senate. When the Assembly considered the Senate version, its Assembly sponsor, Donald Taylor, opposed (New York *Times*, 5-11-74) it in Senate form, claiming it had too many loopholes. The Assembly finally approved a slightly different version May 9, 1974, containing an amendment deleting an exemption for arrest records and tightening the exemption for investigatory files. The Senate gave final approval May 10, 1974. Governor Malcolm Wilson signed the bill into law May 29, 1974, and it became effective Sept. 1, 1974.[18]

Committee on Public Access to Records

Since approval of the FoI law and its implementation, the Committee on Public Access to Records has been meeting on a monthly basis to carry out its responsibilities. In its deliberations so far, it has organized its internal structure and issued guidelines defining fees, procedures and responsibilities of governmental agencies in complying with the act. The committee also has clarified some ambiguous sections of the law for agencies requesting guidance. Recently, it proposed a series of amendments to the 1974 FoI law and a model open meetings law.

The governor appointed four members to the committee, as required by law, to supplement the three members that represent government agencies. The appointees are (*New York Law Journal*, 2-19-75): Elie Abel, committee chairman and dean of the Columbia University School of Journalism; Gilbert P. Smith, editor of the Utica newspapers; T. Elmer Bogardus, publisher of weeklies in central New York; and Robert W. Sweet, former deputy mayor of New York City. Louis R. Tomson is the executive director.

The committee held its first meeting August 21, 1974, but, to the dismay of reporters, it was closed to the public. Committee members explained (New York *Times*, 8-23-74) that they did not feel it was inappropriate for a committee charged with fostering openness in government to hold a closed meeting, because they were discussing internal committee structure and organization. Minutes of the meeting show that the committee elected Abel chairman, was introduced to the committee staff, headed by Tomson, and considered some of the major problems the committee faced implementing the law. These areas included: definition of "records"; definition of "statement of policy"; statutory basis for fees; standards for unwarranted invasion of privacy; and the relationship of the FoI law to previous laws. These matters were to be reviewed at their next meeting.[19]

During its next two meetings, the committee discussed regulations to govern access to records, as directed by the FoI law. The committee declared that each agency must appoint a records officer to supervise agency compliance with the law. That person is responsible for maintaining an updated master list, assisting in identifying records, locating the requested information and deciding whether to disclose it. The regulations also demand appointment of a person to keep an updated payroll list for the agency and releasing it as provided by the law.[20] The agency must make records available during all regular business hours, and if there are no established hours, to implement a written procedure for arranging inspection of the documents requested. Requests for records shall be answered within five working days of their receipt. The committee decided that there should be no fee charged for inspection and search of records, and that the maximum copying fee should be 25 cents. In addition to these requirements, the agency also must make known the location where records may be inspected and the personnel of the agency designated to oversee their use.[21]

In a manner similar to the federal law,[22] each final denial for records can be reviewed by a Civil Service commission for possible disciplinary action.[23] In each of the sections dealing with access to records, the committee warned that their regulations are not to make information any more difficult to obtain than under any previous agency practices. In cases where the procedures had been less restrictive, e.g., where copying was less than 25 cents per page, the easier rules should be followed. "Any conflicts among laws governing access to records," the committee ruled, "should be construed in favor of the widest possible availability of public records."[24]

The committee also issued two resolutions to clarify some ambiguous sections of the law. It ruled that although the FoI law says the public, through the news media, shall have access to information, the intent of the law is to make the information available to "any person, without regard to status or interest."[25] The second resolution declared that although material filed before the law became effective does not have to be included in the master list of available documents, that information is subject to the disclosure provisions.[26]

At its meeting Oct. 31, 1974, the committee heard results of a survey conducted by the staff on government compliance with the law. About 40 per cent of the questionnaires mailed to all state and local agencies were returned, with 80 per cent of those stating they had changed their procedures to comply with the law. Sixty per cent of the respondents said they charged 25 cents or less for copying. Less than 25 per cent said they charged search fees: 80 per cent said they made records available during regular business hours.[27] Amendments to the law that would make it easier to obtain records were approved and introduced into the legislature. The substance of these revisions—and the proposed open meetings law—will be discussed below.

As is evident from the above description, the Committee on Public Access to Records acts as a regulatory agency commissioned by the legislature to promulgate rules. Since the legislative process is lengthy and cumbersome, as is court interpretation, the committee concept allows refinements in the law to take place rather quickly. Within the scope of duties defined by the FoI law, the committee has the force of law to issue procedures. They have no enforcement powers, however, and must rely on the courts in cases of noncompliance. The problems that existed with the previous law, section 66 of the Public Officers Law was its ambiguity in scope and definition. The establishment of the committee allows a flexible response to quarrels over interpretation. Tomson gave his view on the role of the committee in an article in the *New York Law Journal*, Feb. 19, 1975:

> (I)n many ways, the new law simply codifies judgemade law as to the kinds of government records available. However, prior to the passage of the law, there existed no body, short of the courts, to declare the meaning of the access law, or to implement its provisions. This is the role of the Committee on Public Access to Records, a unique creation of the law.

One embarrassing problem of the committee is its lack of a budget. The law establishing the committee provided that the appointees be reimbursed for their expenses in connection with its work, but no appropriation was made for the funding of a committee staff. Because of lack of funds, many of the staff had been borrowed from other state agencies and have been recalled. Discussions with Gov. Hugh Carey regarding a budget for the group are taking place.[28]

Cases Under New Law

There have not yet been many cases seeking records under the new law. At a committee meeting two weeks after the law went into effect, the staff reported that there had been very little increase in demand for records from state agencies.[29] Jerome Wilson, in the *New York Law Journal*, wrote (2-18-75) of "a paucity of cases interpreting the state Freedom of Information Law."

In the earliest case, *Cirale v. 80 Pine Street Corp.*,[30] the state Court of Appeals ruled that the FoI law would not abolish the common law right to confidentiality when it is in the public interest. The court's decision, rendered one and one-half months before the statute took effect, said that an official must prove this public interest to the court, allowing *in camera* inspection of the records if necessary. The court said the determination of public interest was not a function of anyone but the court, a reminder that the Committee on Public Access has limited authority. While the influence and propriety of the rule is questionable since the statute was not in effect at the time of the ruling, it underscores a potential area of conflict in subsequent cases.

A more significant case interpreting the act, *Dillon v. Cahn*,[31] clearly established the impact of the FoI law. The Democratic candidate for district attorney in Nassau County requested information from his Republican opponent in the race, who was the incumbent, regarding travel expenses for his office. The request was refused, with the incumbent claiming that the records were confidential information, containing the names of informants. The court hearing the suit declared that prior to adoption of the FoI law, the district attorney could declare the records confidential and end the matter. The new statute, according to the court:

> (E)nunciated a far more liberal policy and philosophy in this state of the people's right to know . . . Certainly it would frustrate the intent and policy of the Freedom of Information Law to permit a public official to determine what is or is not confidential. . . . The court, on proper application, is the correct forum to determine the validity of the classification.[32]

The court, in October, 1974, ordered the lower courts to review the matter consistent with this interpretation of the law. The case was not pursued in the heat of the last weeks of the campaign.

In the November election, Dillon won and upon taking office launched an investigation of his Republican predecessor's administration. He charged that Cahn had misused county funds by spending inordinate amounts of money on travel expenses and paying informers.

A Freeport, N.Y., weekly newspaper brought suit against that village for refusing to allow copying and inspection of municipal payroll records. The village claimed that the FoI law did not provide for these payroll records to be copied. The village mayor further claimed it was an unwarranted invasion of the privacy of village employees. In *Miller v. Incorporated Village of Freeport*,[33] the state Supreme Court ruled that although the language of the statute is awkward and does not explicitly state that payroll records are subject to inspection and copying, the legislative intent of the section is that the payroll lists are open for inspection. The village has said (*Newsday*, 3-11-75) it will appeal.

Another Long Island weekly newspaper filed suit in the state supreme court in 1975 to prevent the city of Long Beach from charging a fee to inspect city documents. The publisher of the paper said the city began charging a fee of 50 cents for an inspection of records

lasting less than 15 minutes, and $1 for inspections longer than 15 minutes. After the suit was filed, the city halted (*Newsday*, 5-1-74) the fee requirement and the suit was withdrawn.

At a law workshop of the Association of Towns of New York, one town clerk complained (*Newsday*, 2-11-75) that the new law was causing problems for herself and her colleagues. She told of a fellow who came into her office and requested a look at 9,000 dog license applications. After she refused, her supervisor overruled her and allowed the inspection. Soon after, she received calls from people wanting to know why there were samples of dog food left on their porches. Tomson, who was addressing the workshop, told her that the law provided a basis for refusing to disclose information that is to be used for commercial purposes. Most participants at the conference expressed concern about the possibility of requests being so voluminous as to interfere with their normal duties. Tomson responded, summing up the public reaction to the FoI law: "A lot of people have feared an inundation of requests, but our experience shows this just hasn't happened."

Criticism of the FoI Law

Aside from the town clerk who related the dog food incident, most criticism of the law has concerned its flaws as an effective tool for dislodging information from the government. This unhappiness with the law includes its unclear language, lack of a general disclosure statement instead of a list of available materials, and other provisions.

The most comprehensive criticism by an outside observer is an article cited previously, by Jerome Wilson. Entitled "New York's 'Grade B' Freedom of Information Law," it attacks (*New York Law Journal* 2-18-75) the code as not being comprehensive enough and as lacking the safeguards of the revised federal law. Wilson argues that the law presumes the information to be withheld unless it falls under one of the categories requiring disclosure. This puts the burden of proof on the person seeking the material, rather than on the agency, as required in the federal law. In addition, there are exemptions listed to the qualified disclosure provisions. Not only is this a restricted right of access, but it produces gray areas, he argues, in which the records sought fall neither under the records to be made available, nor under the materials exempted from disclosure. Wilson also attacks the privacy section of the bill, claiming that exemption (a) allows too much latitude, granting a strong personal veto over the disclosure of information. Exemption (b) could easily be stretched to cover impropriety in the hiring of public employees. The phrase attached to most of the provisions, allowing withholding information that is "not relevant to the ordinary work of the agency or municipality," could allow too much room for maneuvering by officials desiring secrecy. The exemption for commerical information might grow into a corporate right of privacy law, Wilson wrote, because of its broad language and the variety of interpretations courts could attach to the requirement of nondisclosure to prevent an "unfair advantage to competitors."

A comparison of the New York FoI law with the federal statute highlights other potential problems. While the federal statute as revised provides for payment of fees and expenses by the government if the requester wins, the state law contains no similar provision. Also missing under the state law is a clear requirement that judges review particular documents to ascertain whether claimed exemption is proper; a provision to give FoI cases top priority on the court dockets; a provision that disclosable material be separated from exempt material if possible. The law allows for deletion of identifying details to insure personal privacy, but does not mention a procedure for dealing with partially exempt documents. The investigatory exemption in the law seems so loosely structured that any number of claims for nondisclosure might be upheld in the courts. In a case under the old federal law, which was more specifically constructed than this exemption, the court ruled that even if there were no intention of starting law enforcement proceedings against persons or companies, the agencies could claim exemption.[34]

The court ruling in *Cirale* highlighted the problem of confidentiality not solved by the FoI law. Tomson has said (*New York Law Journal*, 2-19-75) that "the Freedom of Information Act does not specifically end or continue the privilege of confidentiality."

Proposed Revisions of FoI Law and Open Meetings Law

One of the law's best critics is the committee on access. Charged to propose amendments to the 1974 act, they have proposed revisions which answer many of the objections to the current code and make it much more similar to the revised federal law.

On Feb. 14, 1975, the committee approved the revisions, and it was introduced into the Assembly Governmental Operations committee by Assemblyman Joseph F. Lisa.[35]

The amendments almost completely overhaul the 1974 law; they would eliminate the list of documents to be made available and substitute a provision that all agency records should be made available for inspection and copying, with nine exemptions. The exemptions include records that are specifically exempted by state or federal law; an invasion of privacy except where identifying portions can be deleted; relate solely to labor negotiations; would present unfair competitive advantage upon release of commercial information; are compiled for law enforcement purposes, in which it would interfere with justice or disclose informants or investigative technique; endanger the safety of any person; are incomplete and would impair government functions; contain only deliberative material; or are examination questions and answers.

Responsibilities of the agencies for maintaining lists and allowing inspection of documents without any substantial revision are included in the proposals. But there is an added section specifying the response time for information requests. An additional section clearly states that the court has authority to review materials *in camera* and make *de novo* determinations on the classification of the material. Courts also are instructed to move cases to the top of their dockets, and may assess fees and expenses the government incurred by a petitioner for information. The request for documents is substantially upheld. The amendments instruct the court to issue a written report in cases where withholding was capricious, and forward it to the Committee on Public Access for an inquiry. The committee can recommend that disciplinary proceedings be taken against the employee by his superiors. In addition to this provision, the authority of the committee is ex-

panded to include monitoring implementation of the act and preparing studies, and acting as a clearinghouse for information on access to documents. A provision is made that allows the committee to recruit help from other state agencies to accomplish its work. The committee is instructed to make periodic reports to the governor and the state legislature on its activities.

According to a committee memorandum[36] issued March 3, 1974, the revisions would make the law much more liberal. It would transfer the burden of proof from the applicant to the agency. Another major provision is transfer of authority for promulgation of procedures from municipalities to local legislatures. This should result in the adoption of uniform procedures in the regions of the state. The proposal also clarifies the policy of disclosure for deliberative materials and allows such information to be deleted.

The committee also helped draft and submitted to the same Assembly committee a proposal for New York's first open meetings law. The bill provides that all meetings be open to the public with exceptions for judicial or quasi-judicial proceedings; staff meetings of an agency; grand or petit juries; labor negotiations; or any other proceeding closed by federal or state law. Executive sessions would be allowed by a two-thirds vote for matters that, if disclosed: would endanger property or person safety; reveal the identity of law enforcement agents; deprive a person of a fair trial; reveal litigation, personal information, credit ratings, medical history or employment history, matters concerning employment or dismissal. The law requires minutes to be kept of open meetings and prior notice to be made in the media through advertisements.

Court action would be used to enforce provisions of the proposed law. The committee on access would perform the same functions it is charged with under the FoI law. The agency has the burden of proving its actions are in compliance with the bill.[37]

A public hearing was held on the open meetings bill April 16, 1975, by the Assembly committee.

Committee staff director Lloyd T. Nurick said that testimony on the bill was mostly favorable, with the biggest controversy concerning possible inclusion of a penalty provision. The bill states that violations of the open meetings law would result in nullification of the actions taken. The court may also assess the body damages to cover expenses and fees of persons filing suit to open a meeting if the applicant wins.[38]

Common Cause testified at the meeting that there should be a penalty provision included in the bill to make it a misdemeanor or a violation to violate the bill.[39] Nurick said this suggestion was opposed by some government officials.

Testimony on the FoI amendments was also heard at the committee hearing, with the main controversy being the section of the bill giving the Committee on Public Access to Records the responsibility to investigate violations of the law, Nurick said.[40]

In a later interview, Nurick said that the open meetings bill easily passed the Democratic-controlled Assembly in a drastically amended form July 12, 1975, in the closing hours of the legislative session.[41]

The bill took a very simple approach; it stated that all meetings are open unless a simple majority of all the members votes to close the session.

Nurick said the Republican-controlled Senate had told the sponsors of the bill that they would not even consider the measure.

The amendments to the FoI law never made it out of committee, because there was not a very high priority placed on it by the leadership and the governor, who were faced with a number of financial crises in the last weeks of the session.

Nurick said that both bills will be reintroduced into the legislature during its next session.

Conclusions

New York has made considerable progress during the last two years toward opening its government to public inspection.

After facing years of opposition from powerful establishment interests, a law providing access to government information at both the state and local level is on the books. Despite the flaws in the FoI law and its ambiguous language, it presents a starting point for further refinement of right to know legislation. Some sections of the 1974 law, most notably the establishment of the Committee on Public Access, present a fresh idea to the difficulties of interpreting complex legislation.

In fact, research into the freedom of information laws of other states leads this writer to conclude that the New York Committee on Public Access is the only one of its kind in the nation. The committee's rulemaking responsibilities gives it the status of a regulatory agency—charged with overseeing other governmental bodies. This authority was used as an argument against revision of the FoI law in the 1975 legislative session, Nurick said. Some opponents saw no need for passing amendments to the law given the committee's statutory rulemaking powers.

The few court cases decided so far indicate that judges are willing to make a liberal interpretation of the law, based on its legislative intent rather than the confusing language. The judiciary has shown an inclination to draw upon the substantial body of case law developed under the federal FoI act. This approach has led to review of requested documents *in camera*, though the 1974 law failed to make any such provision. Reference to federal FoI decisions has resulted in a tendency to interpret the exemptions to the law of disclosure narrowly.

The proposed revisions to the law, which will be reintroduced next session, would make it very similar to the federal statute and give New York one of the stronger FoI laws in the country. But along with its strong points would come problems, too. For example, the federal law has had difficulty in providing a clear cut definition of what is factual material and what is deliberative material.

With such a strong law, New York would inevitably have to face a conflict between right of privacy and right to know. But the legislature will have until next session to consider this clash as well as the results of the FoI law's first year of operation.

FOOTNOTES

1. New York State Public Officers Law, Article 6, section 88, 9(a).
2. *Ibid.*, section 88, 9(a)ii.
3. *Ibid.*, section 88, 3.
4. *Ibid.*, section 88, 3(a) through (e).
5. *Ibid.*, section 88, 7.
6. *Ibid.*, section 88, 1.

7. 5 U.S.C. 552.
8. Marino, Ralph J., "The New York Freedom of Information Law," *Fordham Law Review*, Vol. 43 (1974) pp. 83-92.
9. Tomson, Louis; memorandum to New York State Committee on Public Access to Records, *Freedom of Information Law; An Historical Perspective*, 9-13-74.
10. *Ibid.*
11. New York State General Municipal Law, section 51.
12. 205 NY 147 (1912).
13. New York State Public Officers Law, section 66.
14. *New York Post v. Moses*, 10 NY 2d 199 (1961).
15. *Easley v. N.Y. State Thruway Authority*, 1 NY 2d 374; and *New York Post v. Leibowitz*, 2 NY 2d 677.
16. Mackell (sponsor) N.Y. Senate Bill, S 487 (1966).
17. Marino, *op. cit.* p. 83.
18. *Ibid.*
19. Committee on Public Access to Records, minutes of meeting 8-21-74.
20. New York statutes, Chapter XXV, Committee on Public Access to Records, Part 1401.
21. *Ibid.*
22. 5 U.S.C. 552.
23. Public Officers Law, Article 6, section 88, 8.
24. New York statutes, Chapter XXV, Part 1401.1(d).
25. Resolution of the Committee on Public Access to Records, Access to Records to any Person, 10-31-74.
26. Resolution of the Committee on Public Access to Records, Retrospective Application of Freedom of Information Law, 10-31-74.
27. Committee on Public Access to Records, minutes of meeting, 10-31-74.
28. Committee on Public Access to Records, minutes of meeting, 12-5-74.
29. Committee on Public Access to Records, minutes of meeting, 9-13-74.
30. 35 NY 2d, 113 (1974).
31. 359 NY Supp. 2d 981 (1974).
32. *Ibid.*
33. *Miller v. Freeport*, NY Supp. 2d 444 (1975).
34. *Weisberg v. Dept. of Justice*, 489 F. 2d 1195 (1973).
35. Amendments to Freedom of Information Law, Assembly Bill 16-499.
36. Memorandum of Committee on Public Access to Records, 3-3-75.
37. Proposed Open Meetings Law, Assembly Bill 9-687.
38. Telephone interview with Lloyd T. Nurick, staff director, Committee on Public Access, April 21, 1975.
39. Testimony of Common Cause before Assembly Committee on Governmental Operations, 4-16-75.
40. Nurick, telephone interview, April 21, 1975.
41. Nurick, telephone interview, July 18, 1975.

APPENDIX

AN ACT to amend the public officers law in relation to public access to records of state and local agencies and to repeal section sixty-six of such law relating thereto

The people of the State of New York representing in Senate and Assembly do enact as follows:

Sec. 1. Section sixty-six of the public officers law is hereby repealed.

Sec. 2. Article six of the public officers law is hereby renumbered to be article seven and a new article six is hereby added thereto, in lieu thereof, to read as follows:

ARTICLE 6
FREEDOM OF INFORMATION LAW

Sec. 85. *Legislative intent.*
Sec. 86. *Short title.*
Sec. 87. *Definitions.*
Sec. 88. *Access to records.*
Sec. 89. *Severability.*

Sec. 85. *Legislative intent.* The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of government actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent on the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of government decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free news media, should have unimpaired access to the records of government.

Sec. 86. *Short title.* This article shall be known and may be cited as the "Freedom of Information Law."

Sec. 87. *Definitions.* As used in this article: 1. "Agency" means any state of municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietary function for the state of New York or one or more municipalities therein.

2 "Municipality" or "municipal" means or has reference to any city, county, town, village, school district, fire district, water district, sewage district, drainage district or special district established by law for any public purpose.

Sec. 88. *Access to records.* 1. Each agency, in accordance with its published rules, shall make available for public inspection and copying:

a. final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

b. those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data, or other materials constituting statistical or factual tabulations which led to the formulation thereof;

c. minutes of meetings of the governing body, if any, of the agency and of public hearings held by the agency;

d. internal or external audits and statistical or factual tabulations made by or for the agency;

e. administrative staff manuals and instruction to staff that affect members of the public;

f. police blotters and booking records;

g. an itemized record setting forth name, address, title, and salary of every officer or employee of an agency except officers and employees of the state law enforcement agencies shall be compiled by each fiscal officer charged with the duty of preparing payrolls for such officers and such records shall be made available for inspection by the officer charged with the duty of certifying such payrolls to bona fide members of the news media upon written notice. In the case of the state police and other law enforcement agencies, the records shall list the officials or employees' titles and salary only, without identifying individual employees. Said written notice shall be made upon a form to be prescribed by the comptroller of the state and shall be reasonable and specify what records are to be requested with particularity. The records may be inspected under the supervision of the particular fiscal officers' office and only in the particular fiscal officers' office during regular working hours and regular working days or at such other place as may be convenient to the particular fiscal officers;

h. final determinations and dissenting opinions of members of the governing body, if any, of the agency; and

i. any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying.

2. Each agency shall make and publish rules and regulations in conformity with this article, pursuant to such general rules as may be issued by the committee on public access to records, pertaining to the availability, location and nature of such records, including, but not limited to:

a. The times and places such records are available;

b. The persons from whom such records may be obtained:

c. The fees, to the extent authorized by this article or other statute, for copies of such information; and

d. The procedures to be followed.

The governing body of a municipality may make and publish uniform rules for any group of or all agencies in that municipality.

3. To prevent an unwarranted invasion of personal privacy, the committee on public access to records may promulgate guidelines for the deletion of identifying details for specified records which are to be made available. In the absence of such guidelines, an agency or municipality may delete identifying details when it makes records available. An unwarranted invasion of personal privacy includes, but shall not be limited to:

a. Disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the agency or municipality;

b. Disclosure of employment, medical, or credit histories or personal references of applicants for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure;

c. Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

d. The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be for private, commercial or fund-raising purposes;

e. Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality.

4. Each agency or municipality shall maintain and make available for public inspection and copying, in conformity with such regulations as may be issued by the committee on public access to records, a current list, reasonably detailed, by subject matter of any records which shall be produced, filed, or first kept or promulgated after the effective date of this article. Such list may also provide identifying information as to any records in the possession of the agency or municipality on or before the effective date of this article.

5. In addition to the requirements imposed by subdivision one of this section each agency or municipality controlled by a board, commission or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding in which he votes.

6. Each agency or municipality on request for identifiable records made in accordance with the published rules, shall make the records promptly available to any persons, and, upon payment of, or offer to pay, the fees allowed by law or rule, either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search for such records, or certify that a record, of which that agency is legal custodian, cannot be found.

7. Notwithstanding the provisions of subdivision one of this section, this article shall not apply to information that is:

a. specifically exempted by statute;

b. confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise, including trade secrets, or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise, but this exemption shall not apply to records the disclosure or publication of which is directed by other statute;

c. if disclosed, an unwarranted invasion of personal privacy, pursuant to the standards of subdivision three of this section; or

d. part of investigatory files compiled for law enforcement purposes.

8. Any party denied access to a record or records of an agency or municipality may appeal such denial to the head or heads, or an authorized representative, of the agency or municipality. If that person further denies such access, his reasons therefore shall be explained fully in writing within seven business days of the time of such appeal. Such denial shall be subject to review in the manner provided in article seventy-eight of the civil practice law and rules.

9.a. A committee on public access to records is hereby created, to consist of the commissioner of the office of general services or his delegate whose office shall act as secretariat for the committee, the director of the division of the budget or his delegate, the commissioner of the office for local government or his delegate and four other persons who are not elected or appointed officials or employees of any other agency, appointed by the governor, at least two of whom are or have been representatives of the news media. Of the four other persons first appointed, one shall be appointed for a term of four years, one for a term of three years, one for a term of two years and one for a term of one year. Thereafter their respective successors shall each be appointed for terms of four years. The committee shall meet from time to time to:

i. advise agencies and municipalities regarding this article by means of guidelines, advisory opinions, regulations or other means deemed advisable;

ii. promulgate and issue rules and regulations in conformity with this article in relation to subdivisions two and four of this section; and

iii. recommend changes in the freedom of information law in order to further the purposes of this article.

b. The four persons appointed by the governor shall be entitled to receive reimbursement for actual expenses incurred in the discharge of their duties.

10. Nothing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to public records kept by any agency or municipality.

89. Severability. If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction,

such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

3. This act shall take effect September first, nineteen hundred seventy-four.